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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEQUOIA BOOKS, INC., an Illinois Corporation,

Petitioner,

vs.

CHARLES McDONALD, individually and in his capacity as Sheriff of the County of Kendall, Illinois, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT:	
THE SEARCH WARRANT ISSUED BY JUDGE BURNELL WAS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT IN *LO-JI SALES, INC. v. NEW YORK*, 442 U.S. 319 AND *MARCUS v. SEARCH WARRANTS*, 367 U.S. 717	2
Generally	2
The Warrant Was Not A General Warrant .	7
Authorities Relied Upon By Petitioner Are Distinguishable	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	PAGE
A Quantity of Copies of Books v. State of Kansas, 378 U.S. 205 (1964)	8
Heller v. New York, 413 U.S. 483 (1973)	3, 6
Lee Art Theater, Inc. v. Virginia, 392 U.S. 636 (1968)	3
Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)	3, 8
Marcus v. Search Warrants of Properties, Etc., 367 U.S. 717 (1961)	2, 3, 8
Marron v. United States, 275 U.S. 192 (1927)	7
Memoirs v. Massachusetts, 383 U.S. 415 (1966)	2
Miller v. California, 413 U.S. 15 (1973)	2, 3
Roaden v. Kentucky, 413 U.S. 496 (1973)	2
Roth v. United States, 354 U.S. 476 (1957)	2
Sequoia Books, Inc. v. McDonald, 725 F.2d 1091 (7th Cir. 1984)	5, 7
Spinelli v. United States, 393 U.S. 410 (1969)	5
Stanford v. Texas, 379 U.S. 476 (1965)	9
United States v. Guarino, 729 F.2d 864 (1st Cir. 1984)	3
United States v. Ventresca, 308 U.S. 102 (1965)	3

CONSTITUTIONAL PROVISIONS AND STATUTES	
U.S. CONST., amend. I	2
U.S. CONST., amend. IV	2
Ill.Rev.Stat., ch. 38, ¶ 11-20	4, 5
Ill.Rev.Stat., ch. 38, ¶ 108-12	6, 9

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RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Judge Burnell, the reviewing officer, had probable cause to believe that Sequoia Books, Inc., Petitioner, was selling obscene material, justifying the issuance of a search warrant.

The warrant was not a general warrant, and the seizure occurred without any exercise of discretion by the police officers themselves. Each item seized contained sexual depictions of a nature specifically described in the warrant.

ARGUMENT

THE SEARCH WARRANT ISSUED BY JUDGE BURNELL WAS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT IN *LO-JI SALES, INC. v. NEW YORK,* 442 U.S. 319 AND *MARCUS v. SEARCH WARRANTS,* 367 U.S. 717.

Generally

The First Amendment to the U.S. Constitution does not protect obscene materials. *Miller v. California,* 413 U.S. 15 (1973); *Memoirs v. Massachusetts,* 383 U.S. 415 (1966); *Roth v. United States,* 354 U.S. 476 (1957). On the other hand, when it comes to obtaining a warrant to search for obscene materials, the warrant must clear "a higher hurdle in the evaluation of * * * reasonableness" under the Fourth Amendment[1] than must similar actions aimed at mere contraband because the determination of what is "unreasonable" is made in light of the "values of freedom of expression." *Roaden v. Kentucky,* 413 U.S. 496 (1973).

To ensure the sanctity of those values, this Court has prescribed a "step in the procedure before seizure designed to focus searchingly on the question of obscenity." *Marcus v. Search Warrants of Properties, Etc.,* 367 U.S. 717, 732 (1961). Within that framework, a warrant can properly issue only after there has been an independent determination by a neutral magistrate as to the issue of obscenity. It *is not* proper for the magistrate at the time of issuance of the warrant to (1) rely solely upon the conclusory asser-

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[1] The Fourth Amendment, in relevant part, provides that:

> no warrants shall issue, but upon probable cause * * * particularly describing the * * * things to be seized.

U.S. CONST., amend. IV.

tions of police officers as to the issue of obscenity; or (2) to leave it to the discretion of executing officers to seize materials which are obscene. *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636, 637 (1968); *Heller v. New York,* 413 U.S. 483 (1973); *Lo-Ji Sales, Inc. v. State of New York,* 442 U.S. 319 (1979); *Marcus v. Search Warrants of Properties, Etc.,* 367 U.S. 717 (1961); *Miller v. California,* 413 U.S. 15 (1973); *United States v. Guarino,* 729 F.2d 864 (1st Cir. 1984). In either instance, the result is the same. The executing officer is left with the discretion of determining whether the communicative item is obscene.

A warrant is properly issued when it is the magistrate who determines whether probable cause exists that a violation of the obscenity laws has occurred. The executing officer must not make obscenity determinations.

In *Miller v. California,* this Honorable Court provided "basic guidelines for the trier of fact" in determining the issue of obscenity. These same guidelines are the standards which must be satisfied by the magistrate in his determination that a violation of the obscenity laws has occurred.[2] *See, United States v. Ventresca,* 308 U.S. 102, 107 (1965).

For Judge Burnell, the judicial officer in this case, to find probable cause existed for the issuance of the warrant in question—that Sequoia Books was selling obscene materials in derogation of the criminal code—required that he first find that the publications were, in fact, obscene

[2] There is a difference, however, between the showing by the magistrate and the quantum of evidence necessary to obtain a final judicial determination of obscenity—the *degree* of evidence—with less being required for probable cause than for proof beyond a reasonable doubt.

in violation of Ill.Rev.Stat., ch. 38, ¶ 11-20.[3] Under *Miller*, to do that required a determination that "Pleasure Fuckers"[4] was obscene when based against this standard:

> Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable * * * law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

An examination of the facts of this case, as developed,[5] reveals that all three factors of the *Miller* test were

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[3] Ill.Rev.Stat., ch. 38, ¶ 11-20, provides in relevant part:

> A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:
>
> (1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; * * *
>
> * * *
>
> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.
>
> * * *

[4] The particular magazine purchased by Investigator McCann and delivered to the chambers of the reviewing officer.

[5] The district court granted a Motion to Dismiss, and so there was no development of the facts of the case. The nature and length of examination given by Judge Burnell to the materials brought to his chambers by Investigator McCann, therefore is unknown. It is known that Investigator McCann delivered the magazine "Pleasure Fuckers" to the Judge's Chambers prior to the warrant issuing.

satisfied and that the judge otherwise had probable cause to believe that Sequoia Books was selling obscene materials.

Indeed, on March 22, 1983 Illinois 16th Judicial Circuit Judge Wilson Burnell was presented with a request for the issuance of a warrant by Kendall County State's Attorney's office investigator Tim McCann. McCann, in seeking the warrant, brought to the Judge's chambers a copy of "Pleasure Fuckers", which had been purchased by him earlier that day. Supplanting the presence of that magazine was McCann's affidavit, which indicated that other magazines sold by Sequoia Books were the subject of criminal prosecutions for obscenity. In each instance, McCann detailed descriptions of the contents of the magazines.[6]

All of this occurred within the detached setting of the Kendall County courthouse. Judge Burnell determined that Sequoia Books was selling materials deemed obscene under the test enunciated by this Court in *Miller*. He then considered the descriptions of the seven other magazines already the subject of obscenity charges.

It is a basic principle that in judging probable cause, the issuing judge is not confined by niggardly limitations or by restrictions on the use of common sense. *Spinelli v. United States*, 393 U.S. 410, 419 (1969). Judge Burnell was on solid ground in considering the magazine and affidavit in determining that probable cause existed; that obscene materials were being offered for sale by Sequoia Books in violation of Ill.Rev.Stat., ch. 38, ¶ 11-20.

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[6] Circuit Judge Posner characterized McCann's description as "in minute and indeed rather disgusting detail." *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091, 1093 (7th Cir. 1984).

On the basis of his determination, the judge directed the officers to seize the following described materials:

> Magazines, movies and video tapes containing depictions, or portions thereof, of the following: Cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthethic [sic] devices, insertion of tongue into anus; which has if considered as a whole a predominant appeal to the pruirent [sic] interest and has no serious educational, literary, or artistic or political value and has no socially redeeming value.

The officers then went out and seized one copy of each item containing any of those described sexual acts. Subsequent to the seizure, a prompt determination of the obscenity issue was available at the request of Sequoia Books (or any other interested party) under Ill.Rev.Stat., ch. 38, ¶ 108-12.[7]

This Court has said that if:

> a seizure is pursuant to a warrant issued after a determination of probable cause by a neutral magistrate, and following the seizure a prompt judicial determination of the obscenity issue is available at the request of any interested party, the seizure is constitutionally permissible.

Heller v. New York, 413 U.S. 483, 492 (1973).

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[7] Ill.Rev.Stat., ch. 38, ¶ 108-12 provides in relevant part:

> Disposition of Obscene Material
>
> In the case of any material seized * * * the judge or court before whom the material is returned shall, upon written request of any person from whom the material was seized, or any person claiming ownership or other right or possession of such material, enter an order providing for a hearing to determine the obscene nature thereof, not more than ten days after such return * * *.

The Warrant Was Not a General Warrant

Even though the warrant was issued upon a showing of probable cause, Sequoia Books argues, the warrant is nevertheless a general warrant and, thus, constitutionally impermissible.

> * * * [h]istory indispensably teaches * * * that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis of their seizure is the ideas which they contain. [citations deleted]. No less a standard could be faithful to First Amendment freedoms * * *.
>
> * * *
>
> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. United States, 275 U.S. 192, 196 (1927).

The warrant in this case left nothing to the discretion of the executing officers. The warrant directed the officers to seize magazines, movies and video tapes containing depictions of certain sexual acts. Judge Burnell was cautious (perhaps overly cautious) of the rights of those involved as is evidenced by his limiting language deemed by both the trial court and court of appeals to have been surplusage. *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091, 1093 (7th Cir. 1984).

Under the operative portions of the warrant, the executing officers were directed to seize only magazines containing certain sexual acts. If they did contain the designated acts, they were to be seized. If the magazines did

not contain the acts, they were not seized. There was no discretion left to the police officers. The fact that there was no discretion vested in the officers is manifested by the fact that Sequoia Books has not alleged, at any point during these proceedings, that any magazine seized by the officers was not specifically delineated by Judge Burnell within the warrant. The warrant was not open ended. It was specific, not general. It was constitutionally proper.

Authorities Relied Upon By Petitioner Are Distinguishable

In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979) the officer was vested with discretion to determine "other similarly obscene materials." The police officers in *Lo-Ji*, thus, had to determine whether the communicative items were obscene. To seize books containing specifically described and defined sexual acts, on the other hand, *does not* require the exercise of discretion. The warrant in *Lo-Ji Sales* contained no standard at all and involved participation in the raid by the judicial officer, who thereby lost his neutrality.

In *A Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964), there was a standard but it was too constitutionally broad, in that it sought the seizure of any book which was designated an "original Night Stand book." That was, in essence, seizure by publisher not content.

In *Marcus v. Search Warrants of Properties, Etc.*, 367 U.S. 717 (1961), this Court determined that the issue of obscenity could not be left to the discretion of the police officers, even if made prior to the seeking of the warrant.[8]

[8] *Marcus* is equally distinguishable from the present facts because it involved the seizure of 11,000 copies of magazines. Here, there

(Footnote continued on following page)

In the case before this Honorable Court the warrant did not leave to discretion the question of obscenity. The police officers were limited in their seizure to magazines, movies and tapes containing certain specific, described acts. The warrant was not a general warrant and did not violate either the First or Fourth Amendments to the U.S. Constitution.

To adopt the position advanced by Petitioner in this case would mean that one could never obtain a constitutionally valid search warrant for seizure of obscene writings or other communications that are as yet unseen, no matter how concrete or compelling the cause for the search. Law enforcement officers would have to buy every issue of every magazine or movie or tape that they suspect obscene. Those purchases would raise suspicion on the part of the store clerk as to the identity of the purchaser and thus thwart the law enforcement process. In the instant case, Judge Burnell was presented with facts establishing probable cause that Sequoia Books was selling obscene materials. He then ordered the seizure of communicative items containing only certain, described sexual acts. As to the officers who executed the search warrant, nothing was left to their discretion. The warrant and procedure were both proper. *See, Stanford v. Texas*, 379 U.S. 476, 485 (1965).

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[8] *continued*
was a seizure of only one of each magazine, and even then Sequoia Books was afforded the protection of Ill.Rev.Stat., ch. 38, ¶ 108-12.

CONCLUSION

By reason of the foregoing, the Petition for Writ of Certiorari of Sequoia Books, Inc. should be denied by this Honorable Court.

Respectfully submitted,

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